

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**J.B., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, St. Louis, MO, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-643  
Issued: November 13, 2009**

*Appearances:*

*David R. Swimmer, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 6, 2009 appellant, through her attorney, filed a timely appeal from an October 14, 2008 decision of the Office of Workers' Compensation Programs denying modification of a loss of wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that her wage-earning capacity determination should be modified.

## **FACTUAL HISTORY**

On March 16, 1998 appellant, then a 50-year old staff nurse, injured her right ankle while in the performance of duty. The Office accepted the claim for right ankle fracture/sprain and talar osteochondral lesion.<sup>1</sup>

On August 15, 2002 the Office found appellant's actual earnings as staff nurse fairly and reasonably represented her wage-earning capacity. It reduced her compensation to zero because her actual wages were either equal to or exceeded those of her date-of-injury position.

On February 14, 2008 appellant filed a claim for a recurrence of disability beginning that day due to her accepted March 16, 1998 employment injury. She noted that she returned to work with restrictions on walking and standing two to four hours, occasional bending, kneeling and stooping and no lifting more than five pounds. Appellant noted that her current job duties required her to do more walking and standing than set by her restrictions.

Appellant submitted clinical notes, a duty status report (Form CA-17) and work status reports from Dr. Charles Mannis, a treating Board-certified orthopedic surgeon. In clinical notes dated February 15 and 29, 2008, Dr. Mannis diagnosed right ankle osteochondritis and stated that she was capable of working with restrictions. Under complaints, appellant reported increased pain spontaneously over the last several weeks. She advised that she had walked more during this time at work. Dr. Mannis stated that appellant had permanent restrictions of no lifting more than 10 pounds and up to two hours of walking and standing per day.

In a letter dated April 1, 2008, the Office informed appellant of the evidence required to modify the August 15, 2002 loss of wage-earning capacity decision.

In clinical notes dated March 28, April 25 and June 23, 2008, Dr. Mannis provided diagnoses of right foot talus osteochondritis dissecans and mild right ankle degenerative arthritis. Appellant "noticed more cramping in her foot and occasional tingling in her whole foot" which seems to be getting worse. She also stated increased discomfort on standing only a few hours. Dr. Mannis noted that appellant was working with restrictions of standing and walking up to four hours per day, which she appeared to be tolerating. He noted that appellant was working with restrictions and was retiring in August.

In a March 25, 2008 letter, the employing establishment asked Dr. Mannis whether he concurred with a modification of appellant's present position. It noted that appellant's position included standing/walking up to 4 hours per day and that it could be modified to no walking more than 30 minutes at a time with a 1-hour interval between walking and standing activities such that she would not be on her feet more than 2 hours within a 4-hour period. Dr. Mannis checked that he concurred with the modification proposed by the employing establishment.

On May 20, 2008 the Office received appellant's undated statement regarding the worsening of her condition. Appellant contemplated an early retirement due to the progressive

---

<sup>1</sup> Appellant retired from the employing establishment effective August 29, 2008.

changes in her right ankle and noted that her light duty currently restricted her to up to two hours of walking and standing.

By decision dated July 23, 2008, the Office denied appellant's request for modification of her wage-earning capacity.

On August 3, 2008 appellant requested reconsideration. She submitted a work status report, which noted restrictions of no standing or walking more than zero to two hours, no lifting more than 10 pounds and total restriction on squatting and bending of her knees. On August 1, 2008 Dr. Mannis related that a magnetic resonance imaging (MRI) scan revealed degenerative arthritis, which has progressed, and residual osteochondritis dissecans. He diagnosed costochondritis and post-traumatic right ankle arthritis. Dr. Mannis noted that appellant was scheduled to retire from the employing establishment on August 22, 2008. On August 1, 2008 Dr. Mannis listed work restrictions of no lifting or carrying more than 10 pounds, no pushing or pulling more than 5 pounds up to five hours per day and zero to two hours per day of walking and standing.

In an August 13, 2008 report, Dr. David M. Peoples, an attending Board-certified neurologist and psychiatrist, reported that nerve conduction studies were normal. The electrodiagnostic studies revealed no evidence of peroneal neuropathy, generalized peripheral neuropathy or tibial entrapment neuropathy. Dr. Peoples opined that appellant's absent sensory response may simply be age related and was bilateral.

By decision dated October 14, 2008, the Office denied modification of the August 15, 2002 wage-earning capacity determination.<sup>2</sup>

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that actual earnings represent a claimant's ability to earn wages.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup> The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>5</sup> Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the

---

<sup>2</sup> Appellant filed a claim for a schedule award on June 30, 2008. As no final decision has been issued on appellant's request for a schedule award, the Board has no jurisdiction to consider this matter. 20 C.F.R. § 501.2(c); see *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to a review of final decisions by the Office issued within one year of the date of the filing of an appeal).

<sup>3</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007).

<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

The Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.<sup>8</sup>

### ANALYSIS

Appellant filed a claim alleging that she sustained a recurrence of total disability as of February 19, 2008. The Office adjudicated whether her August 14, 2002 wage-earning capacity determination should be modified. It reviewed the medical evidence to determine whether there was a material change in the nature and extent of her 1998 right ankle condition such that she could no longer earn wages in her modified position beginning February 14, 2008.

The Board finds that appellant did not submit sufficient evidence to establish that the August 15, 2002 wage-earning capacity determination should be modified.<sup>9</sup> There is no evidence of record that the decision was in error or that appellant was retrained or otherwise vocationally rehabilitated. The medical evidence submitted is insufficient to show that there was a material change in the nature and extent of her injury-related work condition beginning February 19, 2008.

Dr. Peoples reported normal nerve conditions studies and opined that appellant's absent sensory response may simply be age related and was bilateral. He provided no opinion as to whether there was a material change in appellant's ankle condition or whether she was disabled from performing her light-duty job. This report is of diminished probative value, as Dr. Peoples did not address the issues relevant to this claim. Dr. Peoples' report is insufficient to support modification of the August 15, 2002 wage-earning capacity determination.

Dr. Mannis advised that appellant was capable of performing her duties of the modified position on which the 2002 determination was based. On March 25, 2008 the employing establishment advised Dr. Mannis that her position could be modified to no walking more than 30 minutes at a time with a 1-hour interval between walking and standing activities such that she would not be on her feet more than 2 hours within a 4-hour period. Dr. Mannis concurred with

---

<sup>6</sup> *M.A.*, 59 ECAB \_\_\_\_ (Docket No. 07-349, issued July 10, 2008); *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>7</sup> *D.M.*, *supra* note 3; *Sherman Preston*, 56 ECAB 607 (2005).

<sup>8</sup> See Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (June 1996).

<sup>9</sup> *Katherine T. Kreger*, *supra* note 4; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 5.

this modification and reiterated restrictions which included no standing or walking more than zero to two hours and no lifting more than five pounds. In his various clinical notes, Dr. Mannis advised that appellant continued to work with restrictions. These restrictions were consistent with those provided in 2002. On August 1, 2008 Dr. Mannis noted appellant's plan to retire and stated that an MRI scan revealed degenerative arthritis which had progressed and residual osteochondritis dissecans. However, he did not relate the progression of her degenerative arthritis to her employment. Dr. Mannis did not find that appellant was disabled due to a change in her accepted medical condition as of February 19, 2008.<sup>10</sup>

On appeal, appellant's representative contends that the Office failed to assist with the development of the claim.<sup>11</sup> However, it is appellant's burden to prove her claim. As noted, the medical evidence submitted in this case is not sufficient to establish that her ankle condition had materially worsened.

### **CONCLUSION**

The Board finds that the Office properly denied modification of the August 15, 2002 wage-earning capacity determination as appellant did not establish a material change of her accepted condition.

---

<sup>10</sup> K.W., 59 ECAB \_\_\_\_ (Docket No. 07-1669, issued December 13, 2007) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>11</sup> Appellant cited to *William J. Cantrell*, 34 ECAB 1223 (1983) and *Ruthie M. Herring-Vassell*, OWCP No. xxxxxx756 in support of her contention. The Board notes *Ruthie M. Herring-Vassell* is not a Board decision and the Board is not bound by decisions issued by the Office. See *Rob D. Klinger*, 46 ECAB 693 (1995) (the Board has final authority to determine questions of law and fact and its determinations are binding upon the Office).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 14, 2008 is affirmed.

Issued: November 13, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board